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No. 91-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DELTA HOLDINGS, INC.,

Petitioner,

– against –

NATIONAL DISTILLERS AND CHEMICAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Corporate Disclosure Statement

Respondent National Distillers and Chemical Corporation makes this statement pursuant to Rule 29.1 of the Rules of the Supreme Court. On January 4, 1988, National Distillers and Chemical Corporation changed its name to Quantum Chemical Corporation. Respondent has no parent corporation and has the following subsidiary or affiliate companies (excluding wholly-owned subsidiaries):

Domestic Companies	State of Incorporation
Atlantic Energy, Inc.	Delaware
Fallon Propane and Butane Company	Nevada
Petrolane Incorporated	California
Petrolane Finance Corporation	Delaware

Foreign Companies	Country of Incorporation
Cue Insurance Limited	Bermuda
Quantum Petrochemical Corporation Ltd.	England
Petrolane Offshore Limited	Bermuda
Northwest L.P.G. Supply Ltd.	Canada

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

National Distillers and Chemical Corporation, now known as Quantum Chemical Corporation ("Quantum"), opposes the Petition for a Writ of Certiorari filed by Delta Holdings, Inc. ("Delta Holdings"). The Petition has misstated the decision of the Court of Appeals and the issues that would properly be before this Court if certiorari were granted. The controversy turns on its own facts and does not raise any serious issues under the federal securities laws.

ADDITIONAL OPINION BELOW

The summary judgment decision of the district court, which was not appended to the Petition For Writ Of Certiorari, is reported at [1987-1988 Transfer Binder] Fed.Sec.L.R. ¶ 93,700 (S.D.N.Y. April 8, 1988).

Statement Of The Case

A. *The Transaction.*

This action arose out of the sale of the Elkhorn Re Insurance Company ("Elkhorn"), a casualty reinsurer owned by Quantum, to Delta Holdings on September 30, 1983 for $18 million. The sale followed four months of face-to-face negotiations and a detailed investigation of the loss reserves and financial condition of Elkhorn by a team of experts hired by Delta Holdings, including American Risk Management, Inc. ("ARM"), Peat, Marwick & Mitchell ("Peat Marwick") and Conning & Company ("Conning").

The terms and conditions of the Elkhorn sale were set forth in a Stock Purchase Agreement. Under § 5(g) of the Agreement, Quantum warranted that a June 30, 1983 balance sheet of Elkhorn was complete and accurate, prepared in accordance with generally accepted accounting principles ("GAAP"), and fairly presented the financial position of Elkhorn. Under § 12 of the Agreement, the parties agreed that *after* petitioner acquired control on October 1, 1983, it would prepare a September 30, 1983 balance sheet which would be used to adjust the $18 million purchase price paid at the closing. Quantum guaranteed in § 12 that the net worth shown on the September 30, 1983 balance sheet would not be less than $18 million and, if it were, agreed to pay any deficiency by October 31, 1983. The parties further agreed that if a dispute arose concerning the net worth of Elkhorn as of September 30, 1983, it would be promptly submitted to Peat Marwick for "final and conclusive and binding" arbitration.[1]

The September 30, 1983 balance sheet *prepared by petitioner* after the sale showed a net worth of $18 million, as did a June 30, 1983 Pro Forma Statement of Net Assets audited by Peat

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[1] § 12 of the Stock Purchase Agreement is set forth in Note 7 of the Court of Appeals opinion. See Appendix to Petition For Writ Of Certiorari ("P.App.") at 47a.

Marwick before the sale. In the spring of 1984, another balance sheet was prepared and audited by Peat Marwick showing that Elkhorn, which had changed its name to the Delta America Re Insurance Company ("Delta Re"), had a net worth of $19.2 million as of December 31, 1983.

After operating for twenty months under the management of petitioner, Delta Re was declared insolvent by the Kentucky Insurance Department. Delta Re was a victim of the worst downturn in the reinsurance market since 1906, the year of the San Francisco earthquake. More than 90 reinsurers were forced out of business as the result of overcapacity in the industry and unexpected claim development on policies written in previous decades. Delta Re was placed in rehabilitation on May 29, 1985 and in liquidation on September 15, 1985. The present action ensued.

B. *The Proceedings Below.*

The complaint filed by petitioner in the Southern District of New York in 1985 claimed, among other things, breaches of § 5 and § 12 of the Stock Purchase Agreement and violations of the federal securities laws. Underlying the claims were the allegations, *first*, that Elkhorn was insolvent at the time of the sale due to a massive deficiency in the loss reserves; *second*, that the reserve deficiency was concealed by improperly prepared loss development triangles which actuaries use to make reserve estimates;[2] and, *third*, that the President of Elkhorn, Robert Norton, was aware of the alleged deficiency by reason of two actuarial reports prepared in early 1982 by Tillinghast, Nelson & Warren.

In an April 1988 summary judgment decision, the District Court dismissed the claim under § 12 of the Stock Purchase Agreement, ruling that submission to Peat Marwick for "final and conclusive and binding" resolution by October 31, 1983 was the "exclusive remedy" for resolving disputes concerning the net

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[2] Loss development triangles are computer-generated summaries of reported claim information. See P.App.7a.

worth of Elkhorn at the time of the sale.[3] The Court refused to dismiss the breach of warranty and securities law claims, holding that a trial was required to determine if there was any deception relating to the loss development triangles or any concealment of material information during the preacquisition investigation (R.App. 13-14).

After a six-week bench trial in 1988, the District Court ruled on April 10, 1990 that Quantum breached the accounting warranties in § 5 of the Stock Purchase Agreement by failing to disclose a substantial reserve deficiency at the time of the sale and violated the federal securities laws by concealing the Tillinghast reports. The Court construed § 5 as a warranty on the adequacy of the reserves that provided a second and unqualified right to dispute the net worth of Elkhorn, free of the restrictions of § 12. The Court did not find there was any deception concerning the loss development triangles, nor did it find, with the exception of the Tillinghast reports, any concealment of material information during the four-month investigation. While the Court concluded the Tillinghast reports were material, it never explained what the reports would have added to the two in-depth studies of the reserves conducted by Conning and Peat Marwick before the sale.

On October 1, 1991, the Court of Appeals unanimously reversed the trial court, ruling, among other things, that:

- Quantum did not make any representations in the Stock Purchase Agreement concerning the adequacy of the Elkhorn reserves and the representations it did make concerning compliance with GAAP and accounting regularity were truthful. P.App.44a-51a.

- The construction of the Stock Purchase Agreement adopted by the District Court was "so one-sided so as to be implausible" (P.App.45a) and the decision

[3] See Appendix to this Brief ("R.App.") at 8.

to allow petitioner to dispute the net worth under § 5 was "anomalous" in light of its earlier ruling that § 12 was the exclusive remedy for resolving net worth disputes. P.App.8a-49a n.8.

- The Elkhorn method of establishing reserves was well known within the reinsurance industry, fully disclosed to petitioner prior to the sale, and recognized as acceptable under GAAP. P.App.5a, 20a-21a, 50a-51a.

- The massive reserve deficiency established at trial was developed in the "glow of hindsight" by trial court experts who did nothing after the fact that Peat Marwick and Conning could not have done before the sale. P.App.45a-46a.

- The method of preparing the Elkhorn triangles was disclosed to Peat Marwick before the sale and the injury to petitioner was caused by its own misunderstanding of the triangles, not by the conduct of Quantum. P.App.21a-24a, 39a-43a.

- The Tillinghast reports were "red herrings" that did not contain any material information except what was already in the public domain or disclosed to petitioner before the sale. P.App.34a-39a.

C. *Loss Reserves And Casualty Reinsurance.*

Unlike most businesses, the net worth of a casualty reinsurer is difficult to determine because the largest liability on the balance sheet, the reserve for unpaid claims, is unknown and must be estimated.[4] As the Court of Appeals observed,

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[4] "In most businesses cost information is available before sales are made. In the insurance business, however, the cost of the protection sold cannot be finally

(Footnote continued)

underwriting casualty risks "leads to complex problems of financing and accounting because assumptions of third-party liability risks involves substantial delays or 'tails' in the discovery and reporting of claims" (P.App.4a). For long-tail casualty reinsurers like Elkhorn, the 15 to 20 year delays in the reporting process "inevitably create considerable uncertainty" in establishing reserves (*id.*).

While GAAP requires reinsurers to make a reasonable estimate of reserve liabilities,[5] it neither specifies a precise method of estimating reserves or even requires that an actuary prepare or review the estimates (P.App.5a). All of the actuarial methods require subjective judgments and assumptions that can substantially affect the estimated liability, particularly for incurred but not reported ("IBNR") reserves that are highly "conjectural because they must be calculated without knowing even the number of claims" (P.App.9a). As a result, even the most conservative method

> "relies on assumptions as to future events and conditions, that, if wrong, will lead to substantial errors in the final estimate. Consequently, regardless of the actuarial method used, the preparation of, and reliance upon a net worth calculation in a balance sheet for a casualty risk reinsurer is based in large part upon informed guesswork." *Id.*

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determined until after policies have expired and any losses adjusted. . . .[T]he need to make provision, frequently far in advance of settlement for many casualty losses. . . and for losses which have been incurred but have not been reported, presents a difficult problem. . . ." American Institute of Certified Public Accountants, *Audits of Fire and Casualty Insurance Companies* (1966) (the "Audit Guide") at 34.

[5] The fairness of a balance sheet under GAAP "rests on the reasonableness of the estimates of unpaid losses more than on any other item. However, it is extremely difficult to estimate this element of cost accurately." Audit Guide at 34. See Financial Accounting Standards Board, Statement Of Financial Accounting Standards No. 60, "Accounting and Reporting By Insurance Enterprises" (1982).

D. *The Elkhorn Reserves.*

Elkhorn was a small property and casualty reinsurer incorporated in Kentucky with a staff of twelve employees, including secretaries. The President of Elkhorn, Robert Norton, began his career as an accountant and did not have any actuarial training or experience (P.App.13a). In 1972, Elkhorn began reinsuring casualty risks of third parties, where claims typically take 15 to 20 years to develop and the settlement cost is difficult to estimate. To establish reserves for these risks, Elkhorn used the loss ratio method under which it recorded 65% of earned premiums as IBNR reserves unless a ceding company recommended another ratio. The loss ratio method was a recognized method for establishing reserves under GAAP and was expressly authorized by the Kentucky Insurance Code (P.App.5a).[6]

In October 1981, Elkhorn decided to have its reserving procedures reviewed by Tillinghast, Nelson & Warren. In February 1982, Tillinghast delivered a report that described a particular reserving methodology, recommended its use, and appended worksheets that would assist in applying the methodology as of December 31, 1980, but did not express an opinion on the adequacy of the reserves (P.App.35a). In April 1982, Tillinghast delivered a second report covering the reserves on three canceled reinsurance contracts (the "Barrett treaties"), which it estimated were deficient by $10.8 million. Two months later, Elkhorn purchased a $10 million reinsurance policy to cure the estimated deficiency on the Barrett treaties (P.App.16a).

E. *The Reinsurance Experience And Sophistication Of Delta Holdings.*

Delta Holdings was incorporated in 1982 to engage in a worldwide reinsurance business. Delta Holdings was operated by ARM, a reinsurance management company with a staff of

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[6] *See* Audit Guide at 38. Kentucky permits reinsurers to establish reserves by using a 65% loss ratio for workers compensation risks and a 60% ratio for other risks. Ky.Rev.Stat. §304.6-100(3).

300 specialists that provided financial and underwriting services to reinsurers around the world. In March 1983, ARM raised $24 million for Delta Holdings to enter the reinsurance market by selling stock to 24 clients or affiliates, mostly insurance subsidiaries of Fortune 500 companies.[7]

In addition to ARM, Delta Holdings was advised by two other firms with considerable experience in reinsurance, Peat Marwick, which specialized in auditing insurance and reinsurance companies, and Conning, which provided actuarial services to reinsurers in the United States and Europe. The Board of Directors also had substantial experience in reinsurance, since most of the directors managed the insurance subsidiaries of their parent corporations.

F. *The Preacquisition Investigation.*

At the end of 1982, Quantum decided to withdraw from the insurance business and, in May 1983, began exploring the sale of the assumed reinsurance business of Elkhorn to Delta Holdings for a book value price of $18 million. Prior to speaking with Quantum, ARM had been actively searching for reinsurance acquisitions for Delta Holdings and had already reviewed four other companies where the asking price was more than twice book value. Like many other observers, ARM believed the October 1, 1983 renewal season would mark the beginning of a profitable turnaround for the reinsurance industry.

Petitioner began its investigation of Elkhorn in early June 1983. Recognizing that Elkhorn lacked actuarial expertise, Delta Holdings hired a team of 21 professionals to review the Elkhorn loss reserves and reinsurance business, including five actuaries from Conning and Peat Marwick, six Peat Marwick accountants, three attorneys from a Wall Street law firm, six reinsurance specialists from ARM, and an unknown number of investment bankers from Merrill Lynch. Over the next four months, this

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[7] Shareholders in Delta Holdings included Alcoa, American Cyanamid, Cargil, Celanese, Eli Lilly, Firestone, Kaiser Aluminum, Kellogg, Rockwell International, Scott Paper, Sperry, and Weyerhaeuser.

battery of experts descended upon the Elkhorn offices to pour over the books and records and interview the twelve-man staff. With the exception of the Tillinghast reports, the witnesses who participated in the investigation testified that they were given all the documents and other information they requested during the four-month inquiry.

Shortly after the investigation began, Alan Kaufman, a senior Peat Marwick actuary, was asked to provide petitioner with a preliminary opinion on the Elkhorn reserves. During a June 10, 1983 meeting with Kaufman, Norton explained the data, methodology, and assumptions Elkhorn used to test its reserves, giving Kaufman a copy of worksheets containing his most recent analysis that estimated a $250,000 deficiency as of December 31, 1982. The worksheets revealed exactly how the estimate was derived, including loss ratio and loss development assumptions. When Kaufman asked Norton how he learned to prepare a reserve analysis, Norton said he learned the method from Tillinghast, but did not give Kaufman a copy of the 1982 reports (P.App.33a). Norton also told Kaufman about the poorly-performing Barrett treaties and the $10 million reinsurance policy that was purchased to cover expected losses (P.App.18a-19a). After the meeting, Kaufman advised petitioner that some of the loss ratios selected by Elkhorn appeared to be too low and the reserves were deficient by approximately $5 million.

In July 1983, Conning was retained to perform another review of the Elkhorn reserves. On August 3, 1983, the Conning actuaries met with Norton and were told that Elkhorn established reserves by applying a 65% loss ratio to earned premiums unless a ceding company recommended a different ratio (P.App.20a-21a). Norton also gave Conning a copy of his December 31, 1982 reserve analysis showing the data, methodology, and assumptions he used to test the reserves. In September, Conning submitted a report to petitioner estimating a $1.6 million surplus in the reserves, but cautioned that actual losses "may vary significantly from our estimates since underlying data is quite variable and difficult to project" (P.App.21a). Conning also advised petitioner that the Elkhorn reserves depended on loss ratio assumptions and if different assumptions were used, the estimates could change significantly.

While the actuaries were reviewing the reserves, Peat Marwick spent 327 hours auditing the books and records (P.App.21a). As the audit was drawing to a close, one of the auditors, Amy Factor, noticed that the numbers on the Elkhorn loss development triangles were changing, which she knew was not supposed to happen if the triangles were prepared on what is known as a "book-date" basis. When Factor noticed the changes, she spoke with Norton who said he did not know why the numbers were changing and referred her to his staff (P.App.22a). After speaking with the staff, Factor learned the changes were occurring because the Elkhorn computer software prepared triangles on an "account-date" basis.[8] Factor immediately reported her findings to the Peat Marwick actuaries, who were making an independent review of the reserves as part of the audit. The actuaries knew that account-date triangles would result in an understatement of reserves unless adjusted, but after reviewing their earlier work, concluded that a previous adjustment would be sufficient to correct for any understatement (P.App.22a-24a).[9]

On September 28, 1983 the Board of Directors of Delta Holdings met in Hamilton, Bermuda to consider the proposed acquisition. ARM strongly recommended the Board approve the Elkhorn purchase because the company was being sold at book value, when other reinsurers were selling at twice book, and because Delta Holdings would be in an ideal position to take advantage of an expected turnaround in the reinsurance market. The directors were given the Conning report on the Elkhorn reserves and the Peat Marwick report on the June 30, 1983 balance sheet, which showed a net worth of $18 million. The audit report certified that the balance sheet was prepared in accordance with GAAP and fairly presented the financial position of Elkhorn, noting, however, that the largest item on the balance sheet, the loss reserves, was only an estimate and the

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[8] The nature and significance of "account-date" and "book-date" triangles is described in detail in the Court of Appeals opinion. See P.App.7a-12a.

[9] The Peat Marwick witnesses testified that Conning was also notified of the account-date issue, but Conning denied learning this before the sale (P.App.22a).

actual liability could be higher or lower than the estimate. Peat Marwick also warned petitioner that

> "Insurers who establish claim reserves by applying selected loss ratios to earned premium (such as Elkhorn) often understate IBNR due to management's optimism in making loss ratio selections." P.App.25a.

After hearing from their advisors, the directors voted unanimously to approve the Elkhorn acquisition. Petitioner assumed control of Elkhorn on October 1, 1983 and immediately began preparing the September 30, 1983 balance sheet pursuant to § 12 of the Stock Purchase Agreement. On October 24, 1983, the contract balance sheet was completed by ARM and reviewed by Peat Marwick. It showed a net worth of $18 million. With the parties in agreement over the value of the business, the price adjustment and arbitration provisions of § 12 were never invoked (P.App.25a).

REASONS FOR DENYING THE WRIT

This privately-negotiated securities transaction turns principally on an issue of contract interpretation and the "specific facts" of the Elkhorn sale. *United States v. Johnston*, 268 U.S. 220, 227 (1925). The particulars of the face-to-face negotiations and four-month investigation which preceded the sale do not present any issues "of importance to the public as distinguished from . . . the parties. . . ." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

In asking this Court to grant certiorari, petitioner has misstated the rulings of the Court of Appeals. The Second Circuit did not hold that reserve estimates are exempt from the disclosure requirements of the securities laws, it ruled as a matter of contract law that Quantum did not make any representations in the Stock Purchase Agreement concerning the adequacy of the reserves, except for the carefully-worded and limited guarantee in § 12. Nor did the Court rule that materiality standards are inapplicable to investors who retain professional

advisors, it held that information disclosed to the experts *in this transaction* made the Tillinghast reports immaterial as a matter of law. Finally, the Court did not overstep the bounds of FED.R.CIV.P.52: It set aside a finding under the clearly erroneous rule, applied accounting standards recognized by the District Court in its summary judgment decision, and ruled as a matter of law that the Tillinghast reports were immaterial.

1. THE COURT OF APPEALS DECIDED THE RESERVE ISSUES UNDER THE CONTRACT, NOT THE FEDERAL SECURITIES LAWS.

The Court of Appeals never held that reserve estimates "cannot be the basis of claims under § 12(2) or § 10(b)" or that "only misrepresentations of 'hard' facts are actionable under the securities laws. . . ." (Pet. at 15). It simply held as a matter of contract law that Quantum did not make *any* representations concerning the adequacy of the reserves in the Stock Purchase Agreement, other than the limited guarantee in § 12, and that the representations it did make concerning compliance with GAAP and accounting regularity in § 5 were truthful. The Court of Appeals, therefore, resolved the primary issue presented for review under state contract law, not the federal securities laws. In this regard, the approach (if not the judgment) of the Second Circuit was identical to that of the District Court.[10]

While the construction of a privately-negotiated agreement does not merit the attention of this Court, the interpretation adopted by the Court of Appeals was correct under New York law.[11] The absence of a specific warranty on the reserves in

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[10] The District Court restricted its rulings under the federal securities laws to the alleged concealment of the Tillinghast reports. *See* P.App.67a-70a.

[11] Since the District Court held that the contract was unambiguous (R.App. 8-9), the Court of Appeals was entitled to review its construction *de novo*. *Levy v. Gadsby*, 7 U.S. 180, 185, 3 Cranch 109, 112 (1805); *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989).

the contract combined with unequivocal warranties on other balance sheet items, such as the adequacy of the tax reserves and the value of the bond portfolio, strongly indicated that § 5 was nothing more than "a warranty as to accounting accuracy and regularity, not a blanket guarantee of net worth" (P.App.48a). The construction adopted by the Second Circuit was buttressed by "a binding, post-purchase opportunity to arbitrate . . . the adequacy of Elkhorn's loss reserves" under § 12 of the contract (*id.*), which the trial court had earlier ruled was the exclusive remedy for resolving net worth disputes (R.App. 8-10).

Having decided that the representations in the contract were limited to accounting regularity and compliance with GAAP, the Second Circuit concluded that they were truthful as a matter of law. Peat Marwick certified that the June 30, 1983 balance sheet was prepared in accordance with GAAP and the Conning and Peat Marwick actuaries certified that the reserves were reasonable. Certifications by experts who knew *exactly* how the reserves were established was conclusive proof that the methodology and assumptions were reasonable and complied with GAAP (P.App.50a-51a).[12] Petitioner used the same reserve methodology when it prepared the September 30, 1983 balance sheet after the closing, which Peat Marwick also concluded was in accord with GAAP (P.App.25a). On appeal, petitioner did "not even argue that the actuarial method employed by Elkhorn . . . was inherently unreasonable or inconsistent with GAAP" (P.App.50a), nor did it present any evidence that the 65% ratio "was at the time viewed by professionals as so overly optimistic as to violate GAAP" (P.App.51a).

The fact that a third group of experts with the "glow of hindsight" produced a more "compelling" reserve estimate at trial showing a substantial deficiency was irrelevant in determining whether the Elkhorn reserving procedures were reasonable in

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[12] See *infra* at 14-15.

1983.[13] Petitioner never explained what this *third* battery of experts did after the fact that Conning and Peat Marwick could not have done before the sale (P.App.45a-46a). As a result, the Court of Appeals refused to construe the contract "to allow recovery of the full purchase price based on professional expert testimony in court that disagrees with the contemporaneous professional opinions expressed by Conning and Peat Marwick, firms hired by [petitioner] itself to render such opinions." *Id.*

Since the warranties in the contract were truthful, it follows *a fortiori* that they could not support a claim under the federal securities laws.[14] Even if the Court of Appeals had considered the reserve estimates under the securities laws, the result would have been the same. While reserve estimates are actionable if they lack a reasonable basis in fact, where the data, methodology, and assumptions underlying an estimate are disclosed

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[13] Although the Court of Appeals accepted the District Court finding that a substantial deficiency in the reserves "could have been detected from information available" in 1983 (P.App.44a), it also emphasized that this belated discovery was made "in the glow of hindsight" (P.App.22a-23a & n.2) and had "no relevance to the question of whether the June 30 balance sheet conformed with GAAP" (P.App.50a). With its team of actuaries and accountants, petitioner was in a better position than Quantum to understand the effect of account-date triangles on reserve estimates and therefore could not claim it was deceived. See *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856-57 (2d Cir.), *cert. denied*, 247 U.S. 507 (1918) (L. Hand, J.); *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 530 (7th Cir. 1985); *Myzel v. Fields*, 386 F.2d 718, 736 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *McNabb v. Thomas*, 190 F.2d 608, 610-611 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 859 (1951). Cf. *Shappirio v. Goldberg*, 192 U.S.. 232, 241-42 (1904).

[14] While the Court of Appeals did not reach the reserve claim under the federal securities laws, it did consider whether there were any violations of federal law for knowingly or recklessly misrepresenting the effect of the Elkhorn triangles, concluding, as did the trial court *sub silentio*, that no deception or recklessness was established. P.App.39a-43a. This was far from a "dead issue", as petitioner asserts (Pet. at 9 n.7), since it was the only reason why the reserve claim under the federal securities laws was not dismissed on summary judgment. See R.App. 13-14.

to a knowledgeable buyer, as they were here, the requirements of the federal securities law are fully satisfied.[15]

2. THE COURT OF APPEALS NEVER HELD THAT THE MATERIALITY STANDARD WAS INAPPLICABLE TO INVESTORS WHO RETAIN ADVISORS.

In asserting that the Court of Appeals "carved out an exception to the well-established objective standard of materiality" (Pet. at 18) and departed from the "total mix" test of *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), petitioner has again misstated the ruling below. The Court of Appeals *expressly* applied the *TSC Industries* standard and concluded that the Tillinghast reports would not have affected the "total mix" of information disclosed to petitioner (P.App.34a-39a). The alleged "exception" to the objective standard was nothing more than the application of the total mix test to the circumstances of this case.

In assessing the significance of the Tillinghast reports to Delta Holdings, the Second Circuit necessarily restricted its analysis to the actuaries who were responsible for evaluating the reserves, as did petitioner and its expert witnesses in arguing the reports were material (P.App.37a). It would have been difficult to consider the reports in any other context since the business of Delta Holdings was run *entirely* by professionals in 1983. The Court of Appeals, however, did not vary the standard of materiality

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[15] The law "requires nothing more than the disclosure of basic facts so that outsiders may draw upon their own evaluative expertise in reaching" their decisions. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). *See Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 512-16 (7th Cir. 1989); *Dower v. Mosser Indus., Inc.*, 648 F.2d 183, 188 (3rd Cir. 1981); *In re RAC Mortgage Inv. Corp.*, 765 F.Supp. 860, 864-65 (D.Md. 1991); *Pittsburgh Coke & Chemical Co. v. Bollo*, 421 F. Supp. 908, 924 (E.D.N.Y. 1976), *aff'd*, 560 F.2d 1089 (2d Cir. 1977). The significance of the information provided petitioner is apparent from the SEC rules on forward-looking statements, 17 C.F.R. § 240.175, which encourage but do not require disclosure of assumptions. According to the SEC, "disclosure of assumptions is perhaps the most significant factor in facilitating investor understanding" of estimates and projections. See Securities Act Release No. 5992, Fed.Sec.L.Rep. (CCH) ¶ 81,756 at 81,038 (Nov. 7, 1978).

because advisors were used, it applied the objective standard and concluded that *in this transaction* the reports "would have added nothing material" to what was already disclosed to Peat Marwick (P.App.40a). In a different transaction, the Court noted, the reports might have been significant to another actuary who did not have the benefit of the information available to Peat Marwick (P.App.37a).

The approach of the Court of Appeals was consistent with the requirement that materiality be "determined on a case-by-case basis", *Basic Inc. v. Levinson*, 485 U.S. 224, 250 (1988), taking into account "all the circumstances" of a particular transaction. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. at 449. Implicit in the "total mix" test is the recognition that materiality will vary from case to case and that a document which might be significant in one case, may be immaterial in another. *Titan Group, Inc. v. Faggen*, 513 F.2d 234, 239 (2d Cir.), *cert. denied*, 423 U.S. 840 (1975).[16]

3. THE COURT OF APPEALS DID NOT USURP THE FUNCTION OF THE DISTRICT COURT.

The claim that the Court of Appeals overstepped the bounds of FED.R.CIV.P.52(a) is without foundation. The judgment of the District Court was reversed as a matter of law on all major issues. In fact, were it not for the allegations of deception relating to the account-date triangles, the entire complaint should have been dismissed on summary judgment based on undisputed evidence provided by Peat Marwick, Conning, and ARM during pretrial discovery.[17]

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[16] See *Kademian v. Ladish Co.*, 792 F.2d 614, 623 (7th Cir. 1986); *Michaels v. Michaels*, 767 F.2d 1185, 1197 (7th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986).

[17] The breach of warranty claim should have dismissed after the District Court ruled that § 12 was the exclusive remedy for resolving net worth disputes. The securities law claim for misrepresenting the reserves would have been dismissed on summary judgment were it not for the account-date triangle allegations. See R.App. 13-14. The summary judgment record showed, among other things, that Peat Marwick and Conning knew exactly how the reserves were

(Footnote continued)

In any event, each of the assigned errors was a proper exercise of appellate power. Initially, the Court of Appeals did not exceed its authority by setting aside the finding that Norton knew Elkhorn was insolvent before the sale. An appellate court is empowered to set aside a finding "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). After a meticulous review of the record, and without overturning the credibility findings of the trial court,[18] the Court of Appeals concluded there was no evidentiary basis for the finding that Norton "knew" the reserve estimates were understated to the point of insolvency in 1983 (P.App.31a-33a).

While petitioner may disagree with the clearly erroneous ruling, it cannot claim that the approach was in error or that the Court exceeded its authority. The unusually thorough opinion

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established before the sale, that Peat Marwick certified the June 30, 1983 balance sheet, that Conning and Peat Marwick conducted two independent examinations of the reserves for petitioner, that ARM and Peat Marwick prepared the September 30, 1983 balance sheet after the closing, and that the substance of the Tillinghast reports was disclosed to Peat Marwick, ARM, and Conning. Based on this nucleus of undisputed facts, the Court of Appeals reversed the District Court judgment as a matter of law.

[18] Although the Court of Appeals accepted the credibility findings that Norton prepared an initial calculation showing a $10 million deficiency as of December 31, 1980 (P.App.15a) and failed to disclose the Tillinghast reports to petitioner (P.App.33a), neither finding supported the conclusion that Norton "knew" the reserves were understated in 1983. The Court of Appeals properly concluded there was no support in the record for the finding that dated knowledge of the alleged insolvency to October 1981 when Tillinghast was engaged (P.App.31a). Nor was there any evidence in the record that Norton even "suspected Elkhorn's insolvency" after he prepared a reserve analysis showing a negligible deficiency at the end of 1982 (P.App.32a-33a). Norton gave copies of his 1982 analysis to Peat Marwick and Conning, who reviewed his assumptions and methodology and, after performing their own studies, concluded the estimates were reasonable. If Norton "knew" the reserves were deficient, so did Peat Marwick and Conning.

by a distinguished panel of judges demonstrates that the proper standard of review was applied and the "Court of Appeals . . . made a fair assessment of the record." *Peurifoy v. Commissioner*, 358 U.S. 59, 61 (1958). Because another reviewing panel might "find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way", *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951), is not a special or important reason for granting certiorari. See *Dick v. New York Life Ins. Co.*, 359 U.S 437, 461-63 (1959) (Frankfurter, J., dissenting).

The claim that the Second Circuit exceeded its appellate authority by deciding "factual issues" concerning the requirements of GAAP is also misplaced. The relevant accounting standards for establishing reserves were never in dispute and were set forth in the summary judgment decision of the District Court.[19] Moreover, the critical issue was not what GAAP required, but what the contract required. Did Quantum warrant that the reserves were "accurate", as petitioner and the District Court believed, or did it warrant that the balance sheet complied with GAAP and, implicitly, that Elkhorn selected from "a range of 'reasonable' treatments" in establishing reserves? *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 544 (1979).[20] The Court of Appeals construed § 5 as a warranty concerning reserve methodology, not a guarantee of reserve accuracy, and properly concluded that it was truthful as a matter of law (see *supra*

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[19] Citing the Audit Guide, the District Court found in its summary judgment opinion that the fairness of a reinsurance balance sheet under GAAP "rests on the reasonableness of the estimates of unpaid losses" (R.App. 13). The court also found that "[l]oss reserves are contingent on future events, and are very difficult to estimate" (*id.*). See Notes 4, 5, & 6, *supra* at 6-7.

[20] GAAP recognizes that in many areas there is no such thing as a "correct" answer, only "a range of 'reasonable' treatments" where "the choice among alternatives" is left to the discretion of management. *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 544 (1979). "*Thor* requires the district court to defer to the professional judgment of the accountant who prepared" the balance sheet and "also limits a district court . . . to deciding only whether the accountant chose a procedure from the universe of generally accepted accounting principles." *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306, 315 (5th Cir. 1988).

at 13-14). In any event, petitioner does not challenge the validity of the accounting principles recognized by the Court of Appeals, only its failure to cite specific authorities (Pet. at 23).

Finally, the claim that the Court of Appeals engaged in impermissible fact-finding when it determined that the Tillinghast reports were immaterial does not withstand scrutiny. A document is immaterial as a matter of law if its contents are in the public domain, *Johnson v. Wiggs*, 443 F.2d 803, 806 (5th Cir. 1971),[21] or its substance has been otherwise disclosed to the purchaser. *Kas v. Financial General Bankshares, Inc.*, 796 F.2d 508, 517 (D.C. Cir. 1986).[22] The information relating to reserve methodologies in the February 1982 report was in the public domain and was well known to Peat Marwick and Conning. The December 31, 1980 data in the appendix was provided petitioner in updated form in the June 30, 1983 triangles and, to the extent the format of the 1980 data would have revealed the account-date nature of the 1983 triangles, this matter was independently disclosed to Peat Marwick, as were the problems relating to the Barrett treaties in the April 1982 report (P.App.35a-39a).

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[21] See, e.g., *Ward v. Freeman*, 854 F.2d 780, 792-93 (5th Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989); *Elkind v. Liggett & Myers, Inc.* 635 F.2d 156, 166 (2d Cir. 1980); *Hafner v. Forest Lab's, Inc.*, 345 F.2d 167, 168 (2d Cir. 1965).

[22] See, e.g., *Mayer v. Oil Field Systems Corp.*, 803 F.2d 749, 755 (2d Cir. 1986); *Frigitemp Corp. v. Financial Dynamics Fund, Inc.*, 524 F.2d 275, 282 (2d Cir. 1975); *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 530 (7th Cir. 1985); *Koplin v. Labe Federal Sav's & Loan Ass'n*, 748 F.Supp. 1336, 1342 (N.D. Ill. 1990); *Wollins v. Antman*, 638 F.Supp. 989, 994-95 (E.D.N.Y. 1986).

CONCLUSION

For these reasons, the Petition For Writ Of Certiorari should be denied.

Dated: Anaheim, California
March 25, 1992

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DELTA HOLDINGS, INC.,	
Plaintiff,	
— against —	
NATIONAL DISTILLERS AND CHEMICAL CORPORATION,	85 Civ. 3439 (JFK)
Defendant and Third-Party Plaintiff,	
— against —	*OPINION and ORDER*
PEAT, MARWICK, MITCHELL & CO., AMERICAN RISK MANAGEMENT, INC., and FREDERIC M. REISS,	
Third-Party Defendants.	

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JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Background

Plaintiff, Delta Holdings, Inc., ("Delta Holdings") brought this lawsuit against defendant and third-party plaintiff National Distillers and Chemical Corp., ("National Distillers") for events arising out of a commercial transaction. In turn, National Distillers impleaded Peat, Marwick, Mitchell & Co. ("PMM")[1], American Risk Management, Inc. ("ARM") and Frederic M. Reiss seeking indemnification and contribution for any liability resulting from Delta Holdings' complaint.

In an Opinion and Order dated September 4, 1986, this Court dismissed National Distillers' claims for indemnification, and also dismissed National Distillers' claims for contribution with respect to the federal causes of action. At that time, the Court declined to dismiss the contribution claims on the state law claims. After that Opinion and Order was issued, the parties conducted and completed discovery.

Currently before the Court are various summary judgment and dismissal motions made by National Distillers, Reiss and PMM. National Distillers moves to dismiss the negligent misrepresentation and federal racketeering counts of the complaint. In addition, National Distillers seeks summary judgment on the claims that the contract between it and Delta Holdings was breached, as well as on the claims alleging common law fraud and violations of the federal securities laws. Reiss seeks summary judgment on the remaining claim National Distillers asserts against him, and PMM moves again to dismiss, in part, the claim asserted by National Distillers.

For the reasons set forth below, the Court grants in part, and denies in part, National Distillers' summary judgment motion. In addition, Reiss' motion for summary judgment is granted in full, and PMM's motion to partially dismiss is granted in full.

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[1] Peat, Marwick, Mitchell & Co. is now known as Peat Marwick Main & Co.

Facts

In 1981, an entity known as the Reiss Organization began to consider forming a new venture in the reinsurance industry. Simply put, reinsurance involves an insurer assuming a portion of the risks for which another insurer is liable. A reinsurer may insure either primary insurers or other reinsurers in return for a share of the premium. A company obtaining reinsurance, and relinquishing some of its risk, is known as a ceding company. These arrangements are established through what are called reinsurance treaties, which frequently involve the participation of numerous reinsurers. The new venture, which became known as Delta Holdings, would enter the reinsurance industry by either obtaining licenses in various jurisdictions, or by acquiring other, already licensed, reinsurance companies.

One such company was the Elkhorn Reinsurance Company ("Elkhorn"), a wholly owned subsidiary of National Distillers. Elkhorn was formed in 1965 to insure and reinsure the property and casualty risks of National Distillers. National Distillers retained ARM, a corporation formed by Reiss in 1962, to manage Elkhorn's business. In 1971, Elkhorn began assuming reinsurance risks other than those of its parent corporation. At the end of 1982, National Distillers decided to get out of the insurance industry, and focus on its other businesses. In April, 1983, discussions began between ARM and National Distillers concerning the possible sale of Elkhorn to Delta Holdings. After months of negotiation, and investigation by outside experts, a Stock Purchase Agreement ("SPA") was entered on September 30, 1983, pursuant to which Delta Holdings paid $18 million to National Distillers for Elkhorn. This agreement was based on a balance sheet showing Elkhorn had a net worth of $18 million.

After the transaction it became evident that Elkhorn, which had been renamed Delta Reinsurance, was not a financially healthy enterprise. While the trial of this action will resolve the numerous factual questions present, it is nonetheless useful at this time to outline what was seemingly wrong with Elkhorn.

In the reinsurance business, income is realized from two primary sources – premiums and investments. On the other side of the ledger, liabilities are somewhat uncertain and are categorized as loss reserves. As will be described below, loss reserves are a most critical calculation in determining the value of a reinsurance business. In essence, loss reserves are an estimate of the final settlement cost of all unpaid liabilities associated with insurance premiums that have been earned. Loss revenues are broken into two categories: case reserves, which are estimates of the cost of settling reported claims and IBNR (incurred but not reported) reserves, which are estimates of the cost of settling unknown or unreported claims. What makes loss reserves so critical, and hazardous, is the fact that the figure is merely an estimate.

In arriving at a loss reserve figure, at least two methods are used. The first, and more conservative, method is the book date basis which reflects the date a loss or premium was received and entered on the books of the reinsurer. The second approach is the account date basis. This latter method was used by Elkhorn, and reflects the date a loss or premium was reported to the ceding company and not to the reinsurer. Apparently, this method can cause a loss reserve estimate to be too low, which can result in financial instability for a reinsurer.

Reduced to its essentials, this case concerns Delta Holdings' charge that National Distillers knowingly sold it a reinsurance subsidiary that was worthless due to inaccurate loss reserve calculations. National Distillers basically responds that Delta Holdings and its agents, which included PMM and Conning & Co., had access to all the available information, and hence knew, or should have known, of Elkhorn's potential difficulties.

The true financial plight of Delta Reinsurance, formerly Elkhorn, began to emerge during 1984. In July, 1984, the Kentucky Insurance Department conducted an audit of Delta Reinsurance that revealed a $38 million deficiency in the loss reserves as of December 31, 1983. The Kentucky Insurance Department further employed an actuary to analyze Delta Reinsurance. This

study estimated the loss reserve deficiency as of December 31, 1983, to be between $34.5 million and $44.4 million. The actuary provided a final report to the Kentucky Insurance Department in March, 1985 which indicated that the loss reserve deficiency as of December 31, 1984 was between $67.8 million and $77.6 million. Not surprisingly, Delta Reinsurance was placed in rehabilitation on May 29, 1985 and in liquidation on approximately September 1, 1985.

It is Delta Holdings' view that National Distillers concealed Elkhorn's problems through, *inter alia*, the work of Robert Norton, Elkhorn's president, and a National Distillers director. This position is based in part on the fact that in 1982, Norton[2] retained the actuarial firm of Tillinghast, Nelson & Warren to examine Elkhorn's method of computing loss reserves, and to determine whether the loss reserves Elkhorn was carrying were adequate. The Tillinghast report of February, 1982 found Elkhorn's loss ratio too low and a loss reserve deficiency of $11 million as of December 31, 1980. A second report, issued in April, 1982, found that as of December 31, 1981, Elkhorn's loss reserve was deficient by $20 million. It is asserted that these facts, as well as Norton's own calculations, were concealed from Delta Holdings during the negotiations. The complaint sets forth other alleged misrepresentations and omissions that will also be considered at trial.

National Distillers takes the position that Delta Holdings ignored its own experts. It is advanced that despite the fact that Delta Holdings went through with the transaction two PMM actuaries found that Elkhorn had a total reserve deficiency of $8.5 million. Moreover, a PMM auditor discovered that the loss reserves Elkhorn calculated used the account date basis, instead of the more frequently employed book date basis.

This outline of the facts is hardly exhaustive, and the instant motions clearly do not dispose of the case. However, these

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[2] After the SPA was executed, Norton remained on as president of Elkhorn/Delta Reinsurance. He resigned on September 14, 1984, after the initial findings of the Kentucky Insurance Department.

motions, which have been well briefed by the parties, and this decision will hopefully serve to narrow somewhat the issues to be tried.

DISCUSSION

I. Delta Holdings' Claims Against National Distillers

A. The Alleged Breach of § 12 of the Stock Purchase Agreement.

National Distillers seeks summary judgment on Delta Holdings' contention that § 12 of the SPA was breached because Elkhorn's net worth was less than $18,000,000 as of September 30, 1983. Section 12 provides as follows:

> 12. *Adjustment To Purchase Price.* No later than October 17, 1983, Buyer shall deliver a balance sheet of Elkhorn as at September 30, 1983 (the "September 30th Balance Sheet"), prepared in accordance with GAAP and on the same basis as used in the preparation of the June 30th Balance Sheet. The book value of all Bonds, Preferred and Common Stocks included in the September 30, 1983 Balance Sheet will be determined by Princeton Financial Systems Inc. and shall be binding on all parties. Seller guarantees to Buyer that the Net Worth of Elkhorn, as at September 30, 1983 shall not be less than $18,000,000.
>
> In the event that the Net Worth of Elkhorn is greater than $18,000,000 as shown on the September 30th Balance Sheet, then Elkhorn shall pay a dividend to the Seller on or before the 28th October 1983 in an amount sufficient to reduce the Net Worth of Elkhorn to $18,000,000 in accordance with Clause 10 hereof.
>
> In the event that the Net Worth of Elkhorn as shown on the September 30th Balance Sheet is less than $18,000,000, then Seller shall pay such deficit to the Buyer at Fort Lee, New Jersey, or before the 31st of October, 1983, or if such Balance Sheet shall be

> disputed (as below provided) then payment shall be made promptly after the settlement of such dispute.
>
> In the event Seller disputes the September 30th Balance Sheet, Seller shall advise the Buyer not later than the 25th October, 1983 and any such dispute, if not resolved promptly between the parties, shall be resolved by the opinion of Peat, Marwick, Mitchell & Co., which said opinion shall be final and conclusive and binding on all parties hereto.

Delta Holdings posits that the guaranty of Elkhorn's value, set forth in the last sentence of the first paragraph, stands apart from the rest of § 12. According to Delta Holdings, that sentence, when read in conjunction with § 15,[3] supports a cause of action in the event Elkhorn's net worth was less than $18,000,000 on September 30, 1983. Delta Holdings argues that such a surviving guaranty was important to it when negotiating the purchase. Moreover, it is asserted that the clause only makes sense when read as a full fledged guaranty that Delta Holdings would receive $18,000,000 in value in exchange for its $18,000,000 payment to National Distillers. Delta Holdings urges that summary judgment is inappropriate on this claim since there are two reasonable interpretations of § 12.

On the other hand, National Distillers' motion for summary judgment argues that § 12 is clear, unambiguous and susceptible to only one reasonable interpretation. According to National Distillers, the rights granted to the parties under § 12 expired on October 31, 1983. In addition, the parties' exclusive remedy for resolving disputes concerning Elkhorn's September 30, 1983 net worth was submission to PMM for a "final and conclusive and binding" resolution. In the Court's view, these points are clearly and unambiguously articulated in § 12, and summary judgment in favor of National Distillers is required on this claim.

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[3] Section 15 of the SPA provides, "[e]ach of the representations, warranties, covenants and other agreements made in this Agreement shall survive the execution and delivery of this Agreement, the delivery and transfer of the shares and the payment of the Purchase Price, and shall continue in full force and effect."

The standard for granting summary judgment is clear. Where no genuine issue of material fact exists, and the applicable law is in the movant's favor, then summary judgment in favor of the movant is mandated. In contract actions, summary judgment is an appropriate manner of disposition when the contract's terms are clear and not conducive to more than one reasonable interpretation. *Tokio Marine and Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 940 (2d Cir. 1980). A threshold question of law for the Court is whether the terms of the agreement are clear and unambiguous. *Walk-In Medical Centers, Inc. v. Breuer Capital Corp.*, 818 F.2d 260, 263 (2d Cir. 1987).

As noted above, the Court finds § 12 to be clear and unambiguous. Although National Distillers guaranteed the net worth of Elkhorn in § 12, this particular guarantee is intertwined with procedures and remedies lucidly set forth within that section. If Elkhorn's net worth were determined to be more than $18,000,000, then Delta Holdings was to pay National Distillers the difference between the net worth and $18,000,000 on or before October 28, 1983. If Elkhorn's net worth were determined to be less than $18,000,000, then National Distillers was to pay Delta Holdings that difference by October 31, 1983. Disputes were to be resolved either by the parties themselves, or by PMM. It is significant to note that the guaranty of Elkhorn's worth was set forth in the section entitled "Adjustment to Purchase Price," and not in § 5 of the SPA which contained general warranties and representations. Moreover, § 12 makes no reference to § 15 which provides for the continuing effect of "representations, warranties, covenants and other agreements." The parties clearly understood the need for cross-references to other sections within the SPA as shown by the reference in § 12 to § 10. Section 12 makes no reference to either § 5 or § 15.

Section 12 is a specific provision. New York law, which applies in this case pursuant to a clause in the SPA, is clear regarding the relationship between general and specific provisions within a contract. "A specific provision will not be set aside in

favor of a catchall clause." *Williams Higgins & Sons, Inc. v. State*, 20 N.Y. 2d 425, 428, 284 N.Y.S. 2d 697, 699, 231 N.E.2d 285 (1967); *see also John Hancock Mutual Life Ins. Co. v. Carolina Power & Light Co.*, 717 F.2d 664, 669 n.8 (2d Cir. 1983) ("New York law recognizes that definitive, particularized contract language takes precedence over expressions of intent that are general, summary, or preliminary.").

This Court is powerless to hear parole evidence as to Delta Holdings' intent and understanding of the provision because the agreement is clear, complete and valid. *See New York State Energy Research & Development Authority v. Nuclear Fuel Services, Inc.*, 640 F. Supp. 1555, 1557 (W.D.N.Y. 1986); *United States v. Wallace & Wallace Fuel Oil Co.*, 540 F. Supp. 419, 425 (S.D.N.Y. 1982). This Court is also powerless to "rewrite a contract to accord with its instinct for the disposition of equity under the facts of a case." *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 947 (5th Cir.), *cert. denied*, 454 U.S. 965 (1981). The Court will not transform the clear, specific and narrow guaranty of § 12 into a general warranty that should have been, for Delta Holdings' purposes, set forth in § 5.

Summary judgment is entered in National Distillers' favor concerning claims that § 12 of the SPA was breached.

B. The Alleged Breach of Representations and Warranties Contained in § 5 of the Stock Purchase Agreement.

Section 5(g) of the SPA contains a warranty by National Distillers that,

> [t]he June 30th [1983] Balance Sheet and related statement of income are complete and accurate in all material respects, were prepared in accordance with Generally Accepted Accounting Principles ("GAAP"), and the June 30th Balance Sheet presents fairly the financial position of Elkhorn as at that date.

The complaint alleges that this warranty was breached. The June 30, 1983 balance sheet indicated that Elkhorn had an

$18,000,000 net worth and loss reserves of $45,017,000. According to Delta Holdings, however, the balance sheet understated the loss reserve liability by at least $34,000,000, and as a result, Elkhorn had a negative net worth of at least $16,000,000.

The SPA further provided, at section 5(f), a warranty from National Distillers that,

> [t]he books and records of Elkhorn are complete in all material respects and have been maintained in accordance with good business and accepted insurance practices and principles and accurately reflect the financial condition and results of the operation of Elkhorn.

The complaint asserts that this warranty was breached in that the June 30, 1983, and September 30, 1983 balance sheets did not accurately reflect Elkhorn's condition. Furthermore, Delta Holdings contends that Elkhorn's records were not kept in accorance with good business and accepted insurance practices. As mentioned earlier in this Opinion, the essence of this claim is that Elkhorn should have employed a book date basis, rather than an account date basis, in calculating loss reserves.

National Distillers moves for summary judgment on these breach of warranty claims, asserting that Delta Holdings did not rely on these warranties in making the contract. Furthermore, National Distillers states that Delta Holdings knew that the warranties and representations were inaccurate when made.

The Court denies summary judgment on these claims. The parties vigorously dispute whether reliance is an element in a breach of warranty claim. The Court concludes that reliance is not an element in that cause of action, and follows *CPC International, Inc. v. McKesson Corp.*, 134 Misc. 2d 834, 513 N.Y.S. 2d 319 (N.Y. Sup. Ct. 1987), and *Ainger v. Michigan General Corp.*, 476 F. Supp. 1209 (S.D.N.Y. 1979), *aff'd*, 632 F.2d 1025 (2d Cir. 1980). As Judge Cannella stated in *Ainger*, "[w]here the warranty is proved — and especially where it is expressly stated in a signed writing — the promisor should be allowed

to disclaim 'the bargain of the parties in fact as found in their language' . . . only in an extraordinary case, such as one involving illegality or some other overriding consideration of public policy." *Ainger*, 476 F. Supp. at 1225.

This is a case where the warranties are clearly set forth in a signed writing. To require reliance as an element of a breach of warranty claim in such a case would create uncertainty in the commercial context, and blur the differences between warranty claims and misrepresentation claims. The Court also notes, for reasons set forth later, that questions of fact clearly exist concerning Delta Holdings' knowledge of the financial statements' accuracy, and the role National Distillers played in Delta Holdings' obtaining and understanding this knowledge.

C. The Allegations of Fraud.

Delta Holdings claims that National Distillers committed common law fraud and violated the federal securities laws. The federal claims are asserted under § 12(2) of the Securities Act, 15 U.S.C. § 771, and § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j, and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. National Distillers seeks summary judgment on these claims of fraud.

National Distillers argues that actual knowledge of inaccurate representations or warranties bars an action for fraud. *See Rosenbloom v. Adams, Scott & Conway, Inc.*, 521 F. Supp. 372, 390 (S.D.N.Y. 1981), *aff'd mem.*, 688 F.2d 816 (2d Cir. 1982); *Pittsburgh Coke & Chemical Co. v. Bollo*, 421 F. Supp. 908, 925 (E.D.N.Y. 1976), *aff'd*, 560 F.2d 1089 (2d Cir. 1977); *200 East End Avenue Corp. v. General Electric Co.*, 5 A.D.2d 415, 418, 172 N.Y.S.2d 409 (1st Dep't 1958), *aff'd*, 6 N.Y.2d 731, 185 N.Y.S.2d 816, 153 N.E.2d 508 (1959). National Distillers asserts that no genuine issue of material fact exists concerning Delta Holdings' knowledge of Elkhorn's true financial condition at the time of the SPA. The Court differs, and declines to grant summary judgment to National Distillers on the fraud claims.

According to National Distillers, Delta Holdings knew before September 30, 1983 that the Elkhorn loss development triangles used to calculate loss reserves were done on an account date basis. National Distillers reasons that this information was known to PMM and Conning, and since they served as agents for Delta Holdings, the information is to be imputed to the plaintiff. Furthermore, National Distillers notes that no fraud claim can arise out of any inaccuracy in the June 30, 1983 and September 30, 1983 financial statements because Delta Holdings had actual knowledge of the basis on which the loss reserve estimates were made.

Through its agents, Delta Holdings knew that loss reserve figures were estimates. Loss reserves are contingent on future events, and are very difficult to estimate. However, the importance of these loss reserves is profound. In fact, the American Institute of Certified Public Accountants ("AICPA") has stated that, "[t]he fairness of the [insurance] company's representation of its financial position and results of operations usually rests on the reasonableness of the estimates of unpaid losses more than on any other item." Tesoriero Affidavit, Exh. 2, AICPA Industry Audit Guide, Audits of Fire and Casualty Insurance Companies at 28. The critical nature of loss reserves was certainly known to National Distillers and Norton.

Although Delta Holdings knew that Elkhorn used an account date basis to formulate its loss reserves, Delta Holdings was unaware of certain facts that could have altered its view of Elkhorn as an acquisition. During PMM's evaluation of Elkhorn, the accounting firm sought Norton's assistance in certain areas. PMM observed that certain development point numbers on the Elkhorn loss development triangles were changing between the December 31, 1982 analysis, and the June 30, 1983 analysis. This concerned PMM officials who sought the assistance of Norton and Cascio. Elkhorn personnel, who presumably knew more about their company than anyone else, indicated that the main difference between use of the account date instead of the book date would be seen in the most recent underwriting year. *See* Tesoriero Affidavit, Exh. 39, Wasserman Deposition at 121-22; *Id.*, Exh. 29, Kaufman Deposition at 178-79. An issue of fact exists concerning the depth of Norton's knowledge on this subject.

See Tesoriero Affidavit, Exh. 40, Factor Deposition at 134. Norton's important role in PMM's examination is clear from another portion of the Wasserman deposition. PMM wanted to see whether Elkhorn's use of the account date basis only effected 1982 figures, as indicated by Elkhorn personnel. To do this, PMM asked Norton and Cascio to produce representative brokers' statements. A question of fact exists concerning whether Norton produced truly representative statements, or whether certain statements were chosen in an effort to mollify PMM's concerns. *See id.*, Exh. 39, Wasserman Deposition at 126-28.

Moreover, serious questions of material fact exist concerning the non-disclosure of the Tillinghast documents. As mentioned earlier, it is alleged that the actuarial firm of Tillinghast, Nelson & Warren was retained by Elkhorn in 1981 to examine Elkhorn's procedures and formulas. In February, 1982, Tillinghast completed its report which contained a different methodology for the calculation of loss reserves. When Norton applied this approach, he found that the loss reserves as of December 31, 1981 were understated by $6,300,000. Tillinghast issued another report in April, 1982 that evaluated the loss reserves for three reinsurance treaties. This report indicated ultimate losses on these three treaties would be $26,800,000. However, the loss reserves carried by Elkhorn for these treaties was only $18,700,000 as of December, 1981. These facts were withheld from PMM, and could have alerted the firm to the magnitude of Elkhorn's financial problems. *See* Appendix to Delta Holdings' Memorandum of Law, Exh. 23, Kaufman Deposition at 73-75. Thus, Norton, and others for whom National Distillers is responsible, may have withheld material information from Delta Holdings' agents in an effort to brighten Elkhorn's financial picture, and curtail Delta Holdings' understanding of the situation.

The legal significance of these issues is clear. The duty under the federal securities laws to disclose all material facts necessary to make other statements fair, "is not discharged merely by giving the purchaser access to company records and letting him piece together the material facts if he can." *Metro-Goldwyn-Mayer, Inc. v. Ross*, 509 F.2d 930, 933 (2d Cir. 1975). The securities

laws contemplate investors having "full access" to material information. *Hirsch v. du Pont*, 553 F.2d 750, 763 (2d Cir. 1977). In this case, factual questions concerning Delta Holdings' access to information and National Distillers' assistance to Delta Holdings in evaluating Elkhorn's financial condition remain unanswered.[4] For this reason, National Distillers' motion for summary judgment on the fraud claims is denied.

D. Alleged Violation of § 12(2) of the Securities Act of 1933.

Delta Holdings alleges that National Distillers violated § 12(2) of the Securities Act of 1933 by making material misrepresentations and omissions in connection with the Elkhorn sale. Specifically, it is claimed that National Distillers concealed the two reports prepared by Tillinghast in 1982, Norton's calculations based on those reports, and certain monthly management reports. National Distillers argues that this cause of action is barred by the one year statute of limitations applicable to section 12(2), *see* 15 U.S.C. § 77m, and that summary judgment is appropriate.

According to National Distillers, the lawsuit was commenced 20 months after the sale, and that during this period, Delta Holdings had constructive knowledge of the alleged misstatements and omissions. This constructive knowledge argument is based upon Delta Re's employment of three holdovers

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[4] The establishment, and judgment, of loss reserves can lead to liability under the federal securities laws whether one views loss reserve estimates as either facts or opinions. *See Lewis v. Black*, Fed. Sec. L. Rptr., ¶ 95,715 at 90,476 (E.D.N.Y., Sept. 3, 1976) (CCH); *Oleck v. Fischer*, 401 F. Supp. 651, 657 (S.D.N.Y. 1975); *cf. CPC International, Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 519 N.Y.S.2d 804, 813, 514 N.E.2d 116 (1987) (projection of corporation's expected financial performance may constitute material facts to support a fraud claim). This is also true in the context of common law fraud and the insurance industry. *See Glacier General Assurance Co. v. Casualty Indemnity Exchange*, 435 F. Supp. 855, 860 (D. Mont. 1977) ("If the [loss reserve] figures so published are determined arbitrarily and with the intent to deceive and are in fact false, then the publisher is guilty of fraud regardless of whether his expression be one of fact or one of opinion.").

from Elkhorn: Robert Norton, Hugh C. Brewer, III and James D. McGurty. National Distillers contends that the knowledge of these individuals is to be imputed to Delta Holdings under established principles of agency.

Delta Holdings argues that Brewer and McGurty did not know about all of the alleged misrepresentations and omissions made by Norton. Moreover, it is contended that these two individuals lacked knowledge of all of the underlying facts. Regarding Norton, Delta Holdings seeks application of the adverse interest exception that would prevent it from being imputed with Norton's knowledge. Therefore, this reasoning continues, Delta Holdings cannot be deemed to have known of these misrepresentations and omissions until it obtained actual knowledge of them in September, 1984. Since the action was filed in May, 1985, the statute of limitations defense would fail.

The Court concludes that summary judgment is inappropriate on the statute of limitations defense. The extent of Brewer's and McGurty's knowledge of the concealments is unclear, and is much better resolved at trial. If it is established at trial that these individuals had full knowledge of the concealments, and were not part of the alleged fraud, then the statute of limitations could bar the section 12(2) claims. Under the adverse interest exception, Norton's knowledge can certainly not be imputed to Delta Holdings at this point in the case because Norton's failure to disclose his earlier concealments was possibly done in an effort to protect himself from a lawsuit such as this one.

The New York Court of Appeals has limited the circumstances in which the adverse interest exception may be used. It is only applicable when an agent has "totally abandoned his principal's interests and . . . [is] acting entirely for his own or another's purposes. It cannot be invoked merely because he has a conflict of interest or because he is not acting primarily for his principal." *Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 785, 497 N.Y.S.2d 898, 900, 488 N.E.2d 828 (1985). At the present time, one can reasonably infer from the facts presented that as to the earlier misstatements and omissions, Norton "totally abandoned" the interests of Delta Re. Denial of summary judgment

on the statute of limitations issues is entirely consistent with "the ancient principle that no man can take advantage of his own wrong." *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1055 (1969) (citing *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-34 (1959)).

E. Alleged Violations of RICO.

Delta Holdings' complaint alleges that National Distillers violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985) ("RICO"), and that Elkhorn constituted the enterprise. According to Delta Holdings, National Distillers violated section 1962(c), which requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985). National Distillers moves to have this cause of action dismissed.

In essence, Delta Holdings' contention is that in conjunction with the SPA, National Distillers concealed the understatement of Elkhorn's loss reserves and overstated Elkhorn's net worth. In so doing, National Distillers committed the predicate acts of mail fraud and wire fraud. Although more than one predicate act is alleged, this Court rules that the complaint does not state a cause of action under RICO. Delta Holdings does not plead, as is required by the Second Circuit, "the existence of an enterprise whose illicit activities or unlawful goals are continuing ones." *Creative Bath Products, Inc. v. Connecticut General Life Insurance Co.*, 837 F.2d 561, 564 (2d Cir. 1988) (citing *Albany Insurance Co. v. Esses*, 831 F.2d 41 (2d Cir. 1987); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988). This case involves allegations of fraud in the context of one stock purchase agreement. The illicit goal of the alleged enterprise was "straightforward" and "short-lived." *See Beck*, 820 F.2d at 51. It is claimed that National Distillers engaged in fraud when it sold Elkhorn to Delta Holdings. This does not present a situation posing the threat of continuing criminal conduct that RICO seeks to combat. *See United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987); *Chamarac v. Pike*, No. 86 Civ. 7919 slip op. at 19-20 (S.D.N.Y. Oct. 28, 1987) (JFK)

(complaint describing on-going, open-ended limited real estate partnership stated RICO claim). The RICO cause of action in Count V of Delta Holdings' complaint is dismissed.

F. The Alleged Negligent Misrepresentations.

Delta Holdings claims that National Distillers negligently misrepresented material facts, including Elkhorn's net worth as reflected on the June 30, 1983 net assets statement, and on the September 30, 1983 balance sheet. National Distillers moves to dismiss this claim, arguing that it fails to meet the required elements under New York law.

It is well-established in this state that in a negligent misrepresentation claim, a "special relationship" must exist between the parties. This rule was first set forth by the New York Court of Appeals in *International Products Corp. v. Erie R.R. Co.*, 244 N.Y. 331, 155 N.E. 662, *cert. denied*, 275 U.S. 527 (1927). There, the court stated that "the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care . . . An inquiry made of a stranger is one thing; of a person with whom the inquirer has entered or is about the enter into a contract concerning the goods which are or are to be its subject is another." 244 N.Y. at 338. Although there is some suggestion that parties who are negotiating do not have the requisite "special relationship," *see Accusystems, Inc. v. Honeywell Information Systems, Inc.*, 580 F. Supp. 474, 481 (S.D.N.Y. 1984); *Dynamics Corp. of America v. International Harvester Co.*, 429 F. Supp. 341, 356 (S.D.N.Y. 1977); the words of *International Products* indicates that such a black-letter rule is inappropriate. The "special relationship" concept must be adaptable to numerous contexts, and turns on the facts of each case. While the complaint describes a commercial relationship, the Court cannot conclude that the relationship could not have been "special." This determination must await the development of all of the facts at trial.

The motion to dismiss the negligent misrepresentation claim is denied.

II. National Contribution Claim Against Frederic M. Reiss

Reiss moves for summary judgment against National Distillers' third-party complaint seeking contribution on the state law claims. The Court has previously dismissed the third-party claims as to the federal causes of action in an Opinion dated September 4, 1986.

Although the broad facts were set forth earlier, some particular circumstances concerning Reiss should be noted here. Reiss had a long career in the reinsurance industry, stretching back to 1946. In the early 1960's, Reiss moved to Bermuda where he built a network of management companies that administered his various insurance and reinsurance operations. During the early 1980's, he was an active player in the formation of Delta Holdings, and had served as Chairman of the Board of Directors for a period of time. Reiss was also an active participant in Delta Holdings' consideration of possible acqusitions of reinsurance companies, including Elkhorn Reinsurance. In fact, on July 18, 1983, Reiss indicated to the Advisory Committee of Delta Holdings' Board that the Elkhorn acquisition initially looked positive, but much work would still have to be done. Reiss also recommended that outside professional firms be retained to verify independently the assets and reserves of any possible acquiree with an ongoing book of business. After Elkhorn emerged as a candidate, the Advisory Committee approved the engagement of Conning & Co. and PMM to review Elkhorn and its reserves. Conning & Co. opined that the loss reserves were adequate, and PMM certified the June 30, 1983 pro forma statement of Elkhorn's net assets.

An examination of the material facts and relevant law demonstrates that summary judgment must be entered in favor of Reiss. As an initial proposition, the Court again notes that contribution is available when "the third-party's conduct contributed to the 'same injury' suffered by the plaintiff." *Delta Holdings v. National Distillers and Chemical Corp.*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,910 at 94,427 (S.D.N.Y. September 4, 1986). Delta Holdings' harm in this action

is the purchase and possession of a valueless asset. *See id.* Any claim that Reiss should contribute to National Distillers – in the event National Distillers is found liable under state law – due to his failure to evaluate Elkhorn's future profitability is meritless. This case essentially concerns the sale of a company allegedly worthless at the time of the transaction, and not the extent of the company's future profitability.

Several additional grounds exist that compel summary judgment in Reiss' favor. National Distillers urges that Reiss is liable for contribution due to his failure to review personally Elkhorn's business. National Distillers further contends that Reiss failed to keep himself abreast of the investigation into Elkhorn performed by his staff, Conning & Co. and PMM. Moreover, National Distillers argues that Reiss had a duty to supervise actively the investigation because he was a Delta Holdings director, and was ARM's sole beneficial officer and chief executive officer. Lastly, National Distillers asserts that Reiss is liable for telling the Delta Holdings directors that the Elkhorn transaction looked positive at first review, and for relying on outside experts to evaluate Elkhorn. Each of these positions is unavailing.

First, the claims against Reiss as a director of Delta Holdings cannot be asserted by National Distillers. National Distillers was not a Delta Holdings shareholder at the time of the challenged conduct. Therefore, National Distillers lacks standing to assert this claim since allegations that a director breached his affirmative duties to a corporation may only be maintained by the corporation or its shareholders. *See Index Fund, Inc. v. Hagapian*, 417 F. Supp. 738, 745 (S.D.N.Y. 1976). The business judgment rule, recognized in both New York and Delaware, further bars the claim for contribution. Under this rule, a director will not be liable for actions taken in the honest belief that they were in the corporation's best interests, provided the actions were informed and made in good faith. *See Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 273 (2d Cir. 1986); *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 419 N.Y.S.2d 920, 926, 393 N.E.2d 994 (1979); *Smith v. Van Gorkum*, 488 A.2d 858, 872 (Del. 1985). To hold Reiss liable as a director, there would have to be evidence that his conduct was fraudulent or in bad faith,

or constituted a gross abuse of discretion. Even when considered in the light most favorable to National Distillers, the facts adduced on this motion do not raise a question of material fact.

In hindsight, one could argue Reiss might have been wise to ask more questions or read more documents. However, hindsight is not the relevant analysis. One must evaluate Reiss' conduct as of the time it took place. Reiss did not blindly urge Delta Holdings to plunge into an $18 million purchase. Rather, he indicated that while the Elkhorn acquisition appeared promising, much investigating needed to be done. Outside experts were hired to evaluate Elkhorn, and their conclusions, albeit flawed, were relied on in good faith. The Court finds nothing to suggest the contrary. Reiss further relied in good faith on other favorable reports and representations, included among them representations from Norton. Reiss' conduct does not approach the required standard at which he would lose the protection of the business judgment rule.

Reiss cannot be found liable for contribution to National Distillers based on his alleged nonfeasance as an ARM officer. National Distillers contends that Reiss did not meet personally with the auditors and insure that all of the transaction's risks were resolved. These are charges of nonfeasance, and do not support a finding of an agent's liability to one other than his principal. *See Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31, 45, 427 N.Y.S.2d 961, 969, 405 N.E.2d 205 (1980); *Jones v. Archibald*, 45 A.D.2d 532, 534-35, 360 N.Y.S.2d 119, 122 (4th Dep't 1974).

Equally erroneous is National Distillers' argument that Reiss made negligent misrepresentations at the July 18, 1983 Advisory Committee meeting. At that time, Reiss apparently stated that, "Elkhorn Re looked very positive on first review, but still required a lot of work. On the positive side, National Distillers was willing to sell Elkhorn Re for (GAAP) book value." When made, this statement was not a misrepresentation. Reiss did not state that Elkhorn was a flawless acquisition and that the transaction should be completed immediately. Rather, he noted that more work needed to be done. This was accurate, as was Reiss' statement of the positive aspects of the transaction.

National Distillers argument that Reiss breached his duties as a promoter of Delta Holdings also misses the mark. By the time the transaction at issue occurred, Reiss' duties as a promoter had ceased. A Board of Directors was in place and was operating. Furthermore, there is no allegation that Reiss concealed any facts from the subscribers, even if National Distillers possessed standing to assert such a claim. Finally, the Court rejects National Distillers position that Reiss may be liable because he is the sole beneficial owner of ARM. Generally, stockholders are not liable for the obligations of a corporation unless the corporate entity is a sham and agent for a controlling shareholder. This has not been alleged in this case, and no evidence before the Court presents a genuine issue of material fact in this regard.

The summary judgment motion made by Reiss as to National Distillers' contribution claim is hereby granted.

III. The Motion of Peat, Marwick, Mitchell & Co. to Dismiss National Distillers' Contribution Claims

PMM renews its motion to dismiss National Distillers' contribution claim to the extent it is based on National Distillers' liability to Delta Holdings for breaches of the SPA. As set forth earlier, the Court grants summary judgment to National Distillers on that part of Count I of the complaint alleging § 12 of the SPA was breached. The Court, however, denies summary judgment on the allegations in Count I concerning breaches of §§ 5(g) and 5(f) of the SPA.

The Court need not dwell on PMM's instant motion because the central issue has been resolved by the New York State Court of Appeals. In *Board of Education v. Sargent, Webster, Crenshaw & Foley*, 71 N.Y.2d 21 (1987), *aff'g* 125 A.D.2d 27, 511 N.Y.S.2d 961 (3d Dep't 1987), the court ruled that New York's contribution statute, CPLR § 1401, does not apply in the breach of contract setting. The court traced the evolution of contribution in New York and noted that § 1401 "had its genesis in tort law and in the complications surrounding the apportionment of liability among joint tort-feasors." *Id.* N.Y.2d at 27. Thus, National Distillers may not seek contribution from PMM to the

extent National Distillers is found liable for breaching §§ 5(g) and 5(f) of the SPA.

PMM's partial motion to dismiss is granted.

CONCLUSION

National Distillers motion for summary judgment on that portion of Count I dealing with § 12 of the SPA is granted. In addition, the RICO cause of action is dismissed because no pattern of racketeering activity is present. All other portions of National Distillers' motion are denied. The motion of Reiss is granted in full, and PMM's motion for partial dismissal is granted.

The parties are to appear for a pretrial conference on April 20, 1988 at 9:45 a.m. At that time, a firm date for trial will be set.

SO ORDERED.

Dated: New York, New York
April 8, 1988

/s/ John F. Keenan

JOHN F. KEENAN
U.S.D.J.